No. 18,785

IN THE

United States Court of Appeals

For the Ninth Circuit

INTERSTATE PLYWOOD SALES CO.,
a corporation,
Appellant,

vs.

INTERSTATE CONTAINER CORPORATION,
a corporation,
Appellee.

Appeal from the United States District Court for the Northern District of California Southern Division

Honorable W. T. Sweigert, Judge

APPELLEE'S BRIEF

O'GARA & MCGUIRE,
JAMES O'GARA, JR.,
E. JAMES MCGUIRE,
WALTER R. WRIGHT,
Mills Building,
220 Montgomery Street,
San Francisco 4, California,
Attorneys for Appellee.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Table of Authorities Cited

Cases

Codes

Rules

Texts

No. 18,785

IN THE

United States Court of Appeals

For the Ninth Circuit

INTERSTATE PLYWOOD SALES CO., a corporation,	*Appellant,*
vs.	
INTERSTATE CONTAINER CORPORATION, a corporation,	*Appellee.*

Appeal from the United States District Court for the Northern District of California Southern Division

Honorable W. T. Sweigert, Judge

APPELLEE'S BRIEF

I. PRELIMINARY STATEMENT

Subject case is before this court after extensive proceedings in the trial court.

These included a first trial, following which plaintiff-appellant was awarded damages, and a new trial. The new trial was granted on certain issues. The retrial was enlarged in scope after plaintiff itself introduced evidence relative to the contract's inter-

pretation that rendered untenable the basis upon which the court found in plaintiff's favor at the first trial. The case was exhaustively briefed and argued in the court below, and it is defendant-appellee's position that the decision in its favor was the only possible one under the circumstances.

When viewed in the proper legal and factual perspective, it is submitted that the essence of this case is as follows:

(a) The agreement (Exh. 1), gave plaintiff the exclusive option to buy 95% of defendant's production of plywood at certain stated discounts from a private "market price" which was to be the average of the published prices of five named plywood plants, called herein a "five mill formula", intentionally inserted by the parties in the contract for that purpose.

(b) The pricing mechanism in the contract, to wit, the five mill pricing formula contained in paragraph 3 thereof, failed shortly after the contract was executed, without the fault of either party, rendering the contract unenforceable.

Citations to the record below are abbreviated as follows:
1 Tr. means the transcript of the first trial.
2 Tr. means the transcript of the second trial.
DM-NT refers to the transcript dated June 18, 1963 relative to Defendant's Motion for New Trial.
1 Depo. J. refers to the first deposition of F. A. Johnson.
1 Depo. St. O. refers to the first deposition of Lawrence St. Onge.
1 Depo. Schwab refers to the first deposition of W. D. Schwab.
R. means Clerk's Record on Appeal.
Numbers following these abbreviations refer to page numbers, and numbers after a colon refer to line numbers.

II. STATEMENT OF THE CASE

In accordance with Rule 18 (3), defendant-appellee submits the following Statement of Facts, since it considers plaintiff-appellant's Statement has failed to embody certain essential features of the case.

a. Summary of Factual Background and Evidence.

Defendant is a plywood manufacturer, located in Red Bluff, California. Plaintiff is an Oregon corporation, with its principal place of business in Grants Pass, Oregon, and was the assignee of an agreement (Exh. 1) between plaintiff's predecessors in interest and defendant.

Plaintiff's assignors, Fred Fields and F. A. Johnson, own all of the plaintiff corporation stock. (1 Tr. 26; 2 Tr. 90.) F. A. Johnson is president of plaintiff corporation. (1 Tr. 23.) Under the contract, these two individuals were to loan certain monies at 6% interest to defendant to be used for the installation of certain plywood manufacturing machinery to be delivered by Johnson and Fields. Title to the machinery was to remain in Johnson and Fields (Exh. 1, para. 16) until the loans and the machinery costs had been repaid. All of the sums were repaid by defendant with interest at 6%. (1 Tr. 27; 2 Tr. 185-186.)

Fred Fields was in fact manager of the Coe Manufacturing Company of Portland, Oregon, which manufactured machinery used to make plywood. (1 Tr. 97, 98; 2 Tr. 83.) F. A. Johnson had been active in the plywood industry for some years. (1 Tr. 23; 2 Tr. 138.)

The contract in question was drafted at a meeting in Red Bluff, California. (2 Tr. 25.) A "sales agreement" between Grants Pass Plywood Co. and U. S. Plywood Corporation (Exh. 29), which was brought to the meeting by F. A. Johnson, was used as a model for the provisions in the contract which are in dispute. (2 Tr. 31, 40, 101.) Johnson was the president of Grants Pass Plywood Company. (Exh. 29, p. 6.)

Garthe E. Brown, attorney and public accountant (2 Tr. 24) had represented Coe Manufacturing Company, Fields' company, for a number of years (2 Tr. 39), and represented both Fields and Johnson in connection with the drafting of Exhibit 1. (2 Tr. 25.)

The contract executed by the parties followed the price formula idea of paragraph 7 of the model contract (Exh. 29) supplied by plaintiff's predecessors. The contract in question embodied a five plant formula (Exh. 1, para. 3) to be used to set the "market price" (2 Tr. 35) at which price plaintiff would purchase plywood from defendant.

Thus, the parties established their own private "market price" which was to be the average of the published market price listed to jobbers by five specific plywood mills, in five specific locations. (Exh. 1, para. 3.)

The price plaintiff was to pay defendant for plywood when it exercised its "exclusive option to buy" was to be "market price", as determined by the five plant formula, less certain stated percentage discounts. (Exh. 1, para. 3 and 10.)

According to the contract, the price plaintiff was to pay defendant for its plywood purchases was to be reduced by any additional discounts granted by the five plants used in determining "market price" under the formula. (Exh. 1, para. 3 and 10; 2 Tr. 4, 632.)

Plaintiff's predecessors' own attorney, Garthe E. Brown, dictated the provisions relating to the "exclusive option to buy" and the five plant formula used to determine "market price". In fact, the suggestion as to the form of the contract between the parties, including the five plant formula, came from Mr. Brown and F. A. Johnson, plaintiff's president. (2 Tr. 40-42.)

The parties intended the five plant formula to apply to all plywood produced by defendant and to be the means of fixing "market price" under the contract. (1 Depo. J. 6; 1 Tr. 33:23-34:4, 116; 2 Tr. 4, 38, 46, 85-86, 103.) Plaintiff's president, F. A. Johnson, considered the five plant formula to be an outside standard by which to determine price. (2 Tr. 169:1-6.)

The contract provided that the initial term of five years was renewable at plaintiff's option. (Exh. 1, para. 2.) The plaintiff mailed written notice to defendant of its intention to renew the contract on June 14. 1960. (R. 29, para. V.)

When the contract was negotiated, the parties contemplated that defendant would manufacture Digger pine plywood (which later proved unmarketable) (1 Tr. 57-58), and that in the future Douglas fir or other

western soft woods might be used by defendant in producing plywood. (2 Tr. 93-95.)

The parties dealt with each other from October 31, 1955 until November 14, 1960. (Exh. 5.) During this period of over five years:

(1) The five plant formula was never resorted to for "market price" determination (1 Tr. 66, 137; 2 Tr. 326, 356, 363, 367);

(2) Of the five plants specified in the formula some did not publish price lists, others went out of business shortly after the contract was executed, and one other did not publish a price list of products at the specified location (1 Depo. St. O. 12-13; 1 Tr. 72-73, 76:24-25, 91-92, 94; 2 Tr. 333, 363);

(3) Price was actually arrived at by mutual agreement of the parties (1 Tr. 38-39, 61:19-63:9, 68-69, 137:3-9; 2 Tr. 317-325, 355, 382; 1 Depo. Schwab 27);

(4) Additional unpublished discounts appeared in the industry (2 Tr. 57, 70, 78-79, 330-331);

(5) It was impossible to know what these unpublished additional discounts were (1 Depo. J. 14);

(6) All orders placed by plaintiff, where the parties agreed on price, were filled by defendant (1 Tr. 48, 55, 142; 2 Tr. 158, 323, 425; 1 Depo. St. O. 15-16);

(7) Plaintiff knew defendant's production (1 Tr. 74; 2 Tr. 324, 430-431; 1 Depo. St. O. 14);

(8) Defendant complained to plaintiff about lack of orders (2 Tr. 140, 158-159);

(9) Defendant found it necessary to sell to others than plaintiff in order to stay in business (1 Tr. 143; 2 Tr. 141, 422);

(10) Plaintiff was aware of the sales by defendant to others (Exhs. 3, 18; 1 Tr. 149-150; 2 Tr. 168);

(11) The notice requirement of para. 6 of the contract was never complied with (1 Tr. 44, 144; 2 Tr. 432-433; 1 Depo. Schwab 27);

(12) The personnel used by the plaintiff corporation to sell whatever plywood it purchased from defendant was actively engaged in sales work for another sales company and competing plywood mills (1 Tr. 51, 53; 2 Tr. 314; 1 Depo. St. O. 11-12).

On November 14, 1960, defendant notified plaintiff that it did not wish to continue under the "sales option". (Exh. 5.) Plaintiff filed suit on February 10, 1961 to recover damages for an alleged breach by defendant of the "exclusive option to buy" contract. (R. 9, para. II.) Following the initial trial, judgment was entered in favor of plaintiff on May 16, 1962. (R. 66.) A new trial was granted defendant after motion for new trial. (R. 89.) The new trial was granted as to the issue of breach and damages re

so-called "outside sales" and as to the issue of damage resulting from any and all breaches or repudiation of the contract in question. (R. 89.)

In the court's Memorandum of Opinion on Motion for New Trial, the court construed the five plant formula as to price as only applying to Digger pine veneer and Digger pine plywood (R. 81) as distinguished from "Douglas fir" veneer and "Douglas fir" plywood. The defendant had ceased production of any Digger pine products by March of 1956. (2 Tr. 348.)

On the retrial, plaintiff's position, with which defendant agreed, was that the five mill formula applied to all plywood (2 Tr. 4) and not just to Digger pine, and proceeded to introduce evidence to that effect, for reasons which will become obvious hereinafter. (2 Tr. 38, 46, 85-86, 103 and 169.)

b. Vital Provisions of the Contract.

In the contract, plaintiff is "Second Party" and defendant is "First Party".

Plaintiff's option to buy defendant's plywood was stated in the contract as follows:

> "Commencing on the date of this contract Second Party (plaintiff) shall have the exclusive option to buy from First Party (defendant) 95% of the square feet of veneer or plywood produced in its plant at Red Bluff, California". (Exh. 1, para. 1, p. 2.)

A provision as to when plaintiff was to pay defendant for the purchases was included as follows:

"Second Party shall make payment for all invoices to First Party fifteen (15) days after the date of mailing of the invoices by First Party to Second Party". (Exh. 1, para. 4, p. 3.)

The price plaintiff was to pay defendant for the plywood was established as follows:

"The price of plywood purchased by the Second Party from the First Party hereunder shall be the 'market price' to jobbers, less 5% and an additional 2% if the invoice is paid in accordance with paragraph 4". (Exh. 1, para. 10, p. 5.)

Under definitions (Exh. 1, p. 2), "market price" was defined as follows:

"(d) 'Market price' to jobbers shall mean the mill price less the *(five)* 5% *functional* discount to jobbers".

The method for determining the parties' private "market price" was set forth in paragraph 3:

"The parties agree that the published market price listed to jobbers by the following plants shall be *for the purposes of this agreement* the 'market price'." (Italics added in the last sentence):

"United States Plywood Corporation, Anderson, California
Sonoma Plywood Company, Sonoma, California
Tri-State Plywood Company, Santa Clara, California
Industrial Plywood Corporation, Willits, California
Plywood, Inc., Klamath Falls, Oregon".

> "It is recognized that the afore-mentioned mills publish price lists at different intervals and vary their prices by granting additional discounts. It is intended that the Second Party obtain orders for the First Party at the average of such market price, taking into account the changes referred to herein". (Exh. 1, para. 3, p. 3.)

It is noteworthy that in the foregoing definitions and in paragraph 3 and in paragraph 10, the phrase "market price" is in italics at any time the parties are referring to the price to be determined by the five plant formula. The key sentence is that contained in paragraph 3 wherein the parties agree that:

> "The published market price listed to jobbers by the following plants shall be for the purpose of this agreement the 'market price' ".

Paragraph 6 dealt with notice to be given by plaintiff to defendant as to the amount of plywood it would purchase each month from defendant and also gave defendant the right, as to portions not purchased by plaintiff, to sell same on the open market and through its own sales organization.

c. Analysis of How the Discounts Were to Be Applied Under the Contract.

Under "definitions", (Exh. 1, "(d)", p. 2) the parties gave an example of the manner in which discounts were to be applied.

While the application of the discounts to the aforementioned price of $100 is in sequence 5%, 2%, 5%,

the parties referred to the discount as a 5-5 and 2. (1 Tr. 163; 2 Tr. 332.)

d. Market Price: Contract Provisions and Parties' Intentions.

Paragraph 3 of the contract could not have stated the parties' intentions any clearer:

> "The parties agree that the published market price listed to jobbers by the following plants shall be *for the purposes of this agreement* the 'market price' ". (Italics added):
>
> "United States Plywood Corporation, Anderson, California
> Sonoma Plywood Company, Sonoma, California
> Tri-State Plywood Company, Santa Clara, California
> Industrial Plywood Corporation, Willits, California
> Plywood, Inc., Klamath Falls, Oregon".
>
> "It is recognized that the afore-mentioned mills publish price lists at different intervals and vary their prices by granting additional discounts. It is intended that the Second Party obtain orders for the First Party at the average of such market price, taking into account the changes referred to herein."

The record is conclusive that the parties intended the five plant formula to be the determining objective standard to be used in arriving at their own "market price".

Plaintiff's president, F. A. Johnson, who was present when the parties prepared and executed the con-

tract and who supplied the model for the five plant formula provisions, testified:

> "Q. In other words, the formula for working out the market price was the formula that you had contemplated in the sales agreement?
> A. Yes." (1 Depo. J. 6:20-22.)
>
> "Q. Was that arrived at by some list printed by other companies?
> A. It was supposed to be, yes." (1 Tr. 34:2-4.)
>
> "Q. . . . that for the determination of price certain mills should be put into the contract as, you might say, an outside standard upon which to determine prices; isn't that right?
> A. That's right." (2 Tr. 169:2-6.)

Garthe E. Brown, F. A. Johnson and Fred Fields' attorney at the meeting where the contract was drafted, testified as follows:

> "A. *Considerable discussions were had* as to a formula of fixing the price under the contract and the formula that the contract contained using five mills in the area of Northern California, and, I believe, Southern Oregon, were agreed to as a method of fixing the price, if the parties couldn't agree". (2 Tr. 30:22-31:1.) (Italics added.)

In later reference to the same subject matter, Mr. Brown testified:

> "A. . . . in drafting the contract my recollection is that we agreed to that and then fixed this formula in the contract *to settle a price* for all sheathing, whether it was Digger pine or Douglas fir or any other kind of plywood produced". (2 Tr. 38:16-19.) (Italics added.)

W. D. Schwab, defendant's president, testified as follows:

> "A. Yes sir. We set down five mills that we were supposed to use as an average, their selling—their price list, supposed to use their average to determine what we were going to sell our plywood at". (1 Tr. 116:5-8.)

The record thus conclusively supports the fact that the five plant price formula was to apply to all veneer or plywood produced by defendant and not just Digger pine.

At the hearing on defendant's Motion For New Trial, the following exchange between court and plaintiff's counsel took place:

> "The Court: It is your position that this formula here of fixing market prices by reference to the published prices of five of these competitors applied to plywood generally under this contract?
>
> Mr. Dezendorf: That is right. Paragraphs 3 and 10 clearly show that, and that is what they did for five years". (DM-NT 59:8-13.)

In his opening address to the court at the retrial, plaintiff's counsel made the following statement:

> "As was said in chambers, plaintiff believes that the court possibly erred in construing the sales agreement, which is Plaintiff's Exhibit 1, in its holding that the so-called five mill formula applied only to Digger pine. Plaintiff contends that the testimony offered at the last trial was undisputed, and it was that the parties intended

> the five mill formula to apply to any kind of plywood manufactured under the agreement, whether it be Digger pine or Douglas Fir or anything else, and that the last two sentences of Paragraph 3 of the contract are applicable in the case and entitle the plaintiff to any additional discounts granted or allowed by a majority of the five main mills''. (2 Tr. 4:1-12.)

Plaintiff's president, F. A. Johnson; Fred Fields, 50% stockholder; and Garthe E. Brown, their attorney who helped prepare the contract, testified that the five mill formula was intended to apply to all plywood and not just to Digger pine plywood. (Johnson: 2 Tr. 103:7-8; Fields: 2 Tr. 86:13-16; Brown: 2 Tr. 38:18-19, 46:16.)

e. **Failure of the Five Mill Formula.**

Shortly after the execution of the contract, the five mill formula failed, since the five named mills either were not publishing prices or were out of business or, in the case of United States Plywood Corporation, prices were not being published out of the Anderson, California, plant as required by paragraph 3.

Plaintiff's sales manager testified that three of the mills went out of business, one other did not publish price lists, and United States Plywood Corporation did not publish a price list at Anderson, California. (1 Depo. St. O. 12:23-25; 13:5-6, 13:12-17, 13:3-4; 1 Tr. 72:17-19, 92:3, 72:20-22, 73:3-4, 73:5-12, 72:23-25, 92:14-15.)

Plaintiff's president, F. A. Johnson, knew of the situation in respect to the failure of the five mills as a pricing standard. (1 Depo. J. 13:5-14:10.)

A significant exchange between the court and plaintiff's counsel appears in the record:

> "The Court: Yes, I understand that, but how can you find out, how can you possibly enforce it? They speak of an average of five prices. Now, you can't get an average of five prices if two of them don't exist.
>
> Mr. Dezendorf: But you can get an average of those that do exist.
>
> The Court: But that isn't what the contract says.
>
> Mr. Dezendorf: If there were only one, I think there would be some merit to the point, but with five, I don't think so.
>
> The Court: Where do we begin? Where do we stop? It is a matter of degree?
>
> Mr. Dezendorf: As long as you have got three mills you can get an average of, I think you got the contract in operation." (1 Tr. 292:6-20.)
>
> * * * * * * *
>
> "The Court: Yes, but didn't the contract provide that they were to average the market price of all five?
>
> Mr. Dezendorf: They were to average the market price of these five listed mills". (DM-NT 57:10-13.)

f. How the Parties Viewed Price in Their Actual Dealings.

The evidence conclusively shows that the plaintiff purchased and the defendant sold plywood only in those cases where they could agree as to price. If they

could not agree on the price of a particular order, plaintiff did not place its order with defendant.

At all times during the dealings between the parties, Keith Smith was sales manager for defendant. (2 Tr. 347.) He negotiated initially with Bob Ausnes as plaintiff's sales manager (2 Tr. 350) and then Van Horn (2 Tr. 354) and finally throughout most of the time with Lawrence St. Onge.

There were occasions when Keith Smith could not agree with Ausnes or Van Horn as to price. (2 Tr. 354:23-355:4.)

Keith Smith, defendant's sales manager, testified as follows:

> "A. Well in most cases the sales company apparently had an inquiry for a certain amount of plywood with certain conditions attached to it, and they would ask us for a price quotation on it. We would give them that quotation and some times right at that time they would say, 'well, we couldn't sell it at that price, so we couldn't buy it'. They might say, 'We will go back and give this to our customer and see whether it is all right', and depending on the—and their efforts —if they secured an order from a customer they placed the order with us and we filled it". (2 Tr. 355:6-15.)

Plaintiff never insisted that defendant accept an order at what plaintiff contended was the market price. Keith Smith for defendant testified as follows:

> "Q. Well did they ever come back to you, the plaintiff ever come back to you, and say 'we can't

sell at that price, and we insist on an order at what we contend is market price'?

A. I don't recollect that they ever did that". (2 Tr. 357:12-16.)

The testimony of Keith Smith, defendant's sales manager, indicated that there were many differences between the parties as to the price to be paid by plaintiff for the plywood. In such a situation, if they could ultimately agree between themselves as to a price at which defendant would be willing to sell and plaintiff would be willing to buy, an order was placed by plaintiff with defendant. If not, plaintiff did not buy from defendant. The essence of the discussions between the two of them, as the record shows, was an attempt to agree on price. (2 Tr. 359:2-360:25, 381:14-382:18.)

Plaintiff's sales manager, St. Onge, did not consider that he had any right to insist on a purchase at a particular price unless the parties had agreed on the price and he had actually placed an order with defendant:

"Q. And in determining with Red Bluff, when you called them and told them you had an order for this amount of goods, was that at the time that the price discussion would come?

A. Usually you would talk about—it's hard to say—call up the mill and you say, 'I have an order here for . . .' so and so, '. . . and when can you ship it,' and so on, and you would set it up and then perhaps after you dispensed with definite orders, you would discuss market price or other marketing information.

I don't know—many times, I will say, that rather than actually accept an order from any particular customer I would first consult with Mr. Smith and if there was a definite price on this order that we had talked about, I would tell Mr. Smith about it; if there was not. We would try to discuss a price that we could get the order for. But I did not, unless I had a previous agreement from Mr. Smith, accept an order because *I could get stuck with it.*

Q. So that as these orders came in, I am speaking of separate transactions, you treated each one as a separate transaction insofar as price is concerned?

A. Yes, in a matter of consistency—I mean, our orders for, say, a given three or four-day period might all be exactly the same price, yes.

Q. But then the price would change and the next order would be a new transaction?

A. Perhaps, yes.

Q. Were all these orders confirmed by you?

A. The ones that we had placed at Red Bluff?

Q. Yes.

A. Yes, they are confirmed.

Q. They were confirmed individually, weren't they?

A. Yes.

Q. Many of those orders were confirmed with the price that you and Mr. Smith had agreed upon?

A. Oh, naturally.

Q. Would you say that was all of them?

A. *It would have to be agreeable or he wouldn't have confirmed it, yes."* (1 Tr. 68:5-69:18.)

"A. Usually I attempted to work the order out prior to the time I put it down there, because, otherwise, *I might be stuck with the order,* not having any place to place it." (2 Tr. 325: 10-13.) (Emphasis added.)

The record shows that the intention of the parties, at the time of the execution of the contract, was that any disagreements as to price had to be resolved by reliance on the five plant formula. Garthe E. Brown, plaintiff's attorney testified as follows:

"A. Considerable discussions were had as to a formula of fixing a price under the contract and the formula that the contract contained using five mills in the area of Northern California, and I believe, Southern Oregon were agreed to as a method of fixing the price, *if the parties couldn't agree".* (2 Tr. 30:22-31:1) (Emphasis added)

When the parties could not agree as to price, plaintiff did not insist that defendant sell at a price plaintiff considered to be the market price. (2 Tr. 334:20-335:1.)

Customers were usually customers of several mills.

"Mr. McGuire: Q. Don't other mills sell these same customers?

A. Yes.

Q. And, in fact, that is generally true, a customer may be a customer of a number of mills; isn't that right?

A. That is right." (2 Tr. 594:12-17.)

Without a workable formula for price fixing, it was extremely difficult to establish price because of sharp

fluctuations in the market and honest disagreements as to market price in general. (Testimony of St. Onge: 1 Tr. 64:21-23; 2 Tr. 333:13-16; 334:13-19.)

g. **The So-Called Outside Sales.**

F. A. Johnson, plaintiff's president, knew that the plaintiff was not buying and the defendant was not selling plywood when they could not agree on price. (2 Tr. 324:23-325:4.)

While the contract required plaintiff to notify defendant of the portion of defendant's production it planned to buy each month (Exh. 1, para. 6), plaintiff never gave such notice to defendant. (1 Tr. 44:10-12; 2 Tr. 432:10-433:6.)

Keith Smith testified as follows:

> "The Court: Was there ever any discussion between you and Mr. St. Onge concerning any such notice?
>
> The Witness: No there was never any discussion of that. Mr. St. Onge and I were practically in daily contact and I knew from the number of the orders that we got how many orders he had coming in that we were going to fill, and he knew from talking to me about how much we were going to make". (2 Tr. 432:10-433:6.)

Plaintiff was fully aware from early in the relationship of the parties that outside sales were being made by defendant. Its president, F. A. Johnson, acknowledged this fact in a letter to defendant, dated September 17, 1956, about six months after defendant began producing fir plywood:

> *". . . Also, I feel that our orders, which are generally from repeat accounts, should be given priority over business you may be receiving from the outside".* (Exh. 18, emphasis added.)

Defendant, in fact, on May 10, 1960, advised plaintiff that it had made substantial sales to other customers "when orders from Interstate Plywood Sales Company were insufficient to maintain operations . . ." (Exh. 3.)

Defendant often found it necessary to sell to others in order to keep its mill in operation. (1 Tr. 143:12-21; 2 Tr. 422:3-13.)

Plaintiff's president, F. A. Johnson, was well aware of this fact:

> "Mr. McGuire: All right. The fact of the matter is that it was necessary for Interstate Container Corporation to go out on the market to sell their plywood in order to stay in business, wasn't it?
>
> A. Yes". (2 Tr. 141:1-5.)

Plaintiff's president admitted that defendant was regularly complaining about the fact that plaintiff was not buying enough plywood from defendant. (2 Tr. 140:18-25, 158:23-159:2.) Concomitant with the lack of orders placed by plaintiff with defendant was the organization in 1960, prior to the termination of dealings between the parties, of a competitive plywood mill by plaintiff's president, F. A. Johnson. This was Veneer Products, another sheathing mill. (2 Tr. 154:13-17, 154:25.)

Plaintiff's sales manager, Lawrence St. Onge, was also sales manager for another plywood sales company, Plywood and Veneer Sales Company. In the Spring of 1960, when Veneer Products, the competing plywood mill, was built under the auspices of plaintiff's president, St. Onge also acted as its sales manager. (2 Tr. 150-151.) While St. Onge was sales manager for Plywood and Veneer Sales Company, as well as plaintiff company, he was responsible for selling the output of both Grants Pass Plywood Company and defendant, Interstate Container Corporation. (1 Tr. 53.)

During the period of the so-called outside sales St. Onge knew the defendant's production and testified that he never felt defendant was withholding information from him.

> "Q. But at all times, as I understand it from your former testimony—correct me if I am wrong—you were kept informed concerning their production and they were kept informed concerning what orders you had?
>
> A. I had discussed with Mr. Smith with regard to what they would produce, yes.
>
> Q. Did you ever at any time feel that they were withholding information from you as to what their production capability was, what their output was?
>
> A. No, I knew the equipment they had down there and I knew about what they would produce. I knew about what this equipment would produce". (2 Tr. 324:7-18.)

> "Q. Were you pretty much constantly aware of what was being manufactured down there?

A. I had a general idea of what was being produced, yes, although I couldn't give you specific figures of exact footage.

Q. Did you ask them what their production was going to be?

A. Yes.

Q. Did he give you specific answers?

A. Usually, yes". (1 Tr. 74:9-17.)

St. Onge further testified that plaintiff did not buy 95% of defendant's production because they couldn't agree on price:

"The Court: What was the reason you didn't take 95 per cent—was because what?

The Witness: Many times we could not arrive at a price list that was competitive.

The Court: You mean you couldn't agree on a price?

The Witness: Right". (1 Tr. 75:4-9.)

h. The Provision in the Contract as to Additional Discounts.

The contract provided:

"It is recognized that the *aforementioned mills* publish price lists at different intervals and vary their prices by granting additional discounts. It is intended that the Second Party obtain orders for the First Party at the average of such market price, taking into account the changes referred to herein". (Exh. 1, para 3.) (Italics added.)

The foregoing provision is contained in paragraph 3 of the contract and is inextricably linked with the five plant pricing formula. In fact, the "additional

discounts" referred to therein obviously mean the discounts being granted by the five named mills.

The evidence shows that the five named mills were not publishing prices, or were out of business or in the case of one mill, prices were not being published at the location specified in the contract. Additional discounts were also not being published by any mills in the industry. (2 Tr. 330:4-6.) Plaintiff never insisted that defendant sell to it on the basis of additional discounts being granted in the industry. (2 Tr. 337:2-15.) In fact, plaintiff's personnel were purchasing plywood from other plywood manufacturers in which they were personally interested on the basis of a discount of 5-5-2, the same discount at which they were purchasing from defendant. (2 Tr. 148:22-149:10.)

The following statement by plaintiff at the commencement of the retrial is significant:

> "Plaintiff contends that the testimony offered at the last trial was undisputed, and it was that the parties intended the 5-mill formula to apply to any kind of plywood manufactured under the agreement, whether it be Digger pine or Douglas fir or anything else, and that the last two sentences of Paragraph 3 of the contract are applicable in the case and entitle the plaintiff to any additional discounts granted or allowed by a majority of the five main mills". (2 Tr. 4:6-12.)

Apparently plaintiff took this position at the retrial in an effort to receive the benefits of the additional discount provisions of paragraph 3 while, at the same

time, seeking to escape the effect of the five plant formula, an essential and constituent part of the very paragraph.

* * * * * * *

The advent of a competing plywood company under the auspices of plaintiff ultimately came to the defendant's attention. Keith Smith, defendant's sales manager, testified as follows:

> "Mr. O'Gara: Q. Mr. Smith, at this particular period in January of 1960 was the plaintiff company engaged in or in association with any other mill producing sheathing plywood or about to produce sheathing plywood?" (2 Tr. 435: 13-16.)
>
> "The Witness: He told me that they had—and this is not quoting him verbatim—he told me that they were ready or about ready or were beginning to produce plywood and they were going to use the Pittsburgh Testing Laboratories as the company that was going to certify the adherence to the commercial standard". (2 Tr. 436:23-437:3.)

In that same year, defendant refused to deal further with plaintiff. (Exh. 5.)

III. DISTRICT COURT FINDINGS

Following the retrial the court concluded that:

(1) Plaintiff's undisputed position was correct and that the five mill formula was intended to apply to all kinds of plywood (R. 98);

(2) The case was tried on the theory that shortly after the execution of the contract it had become impossible for the parties to ascertain market price according to the formula (R. 101);

(3) Failure of the parties' own particular standard for determining "market price" without fault of either party was fatal to enforceability of the contract (R. 102);

(4) Defendant could not be held prospectively liable (R. 117);

(5) As to transactions completed prior to November 14, 1960 (the date when defendant notified plaintiff it did not wish to continue under the "sales option"), the parties had disregarded and waived the formula and were, during that period, operating under a written contract modified by mutual waiver and consent in accordance with Civil Code Section 1698 (R. 108); and

(6) Plaintiff was not entitled to recover.

The judgment from which plaintiff has taken this appeal was entered in favor of defendant on March 21, 1963. (R. 161.)

IV. QUESTIONS INVOLVED

The fundamental questions involved on this appeal are:

(1) Did the trial court properly construe the "Sales Agreement" to be a contract which became unenforceable when the formula intentionally inserted

therein as the determinant of "market price" for the purposes of the contract, failed without the fault of either party? Defendant contends that it did.

(2) Did the trial court properly construe the conduct of the parties, as to executed transactions, to constitute a modification of the contract's pricing provisions by mutual waiver and consent? Defendant contends that it did.

(3) Did the trial court properly find that defendant did not breach the contract by making sales to others of the production as to which plaintiff did not exercise its option? Defendant contends that it did.

(4) Did the trial court act properly and within its authority in reversing its prior holding that the contract was valid and enforceable, in view of the evidence introduced at the retrial by the plaintiff on contract interpretation? Defendant contends that it did.

Findings of Fact will not be set aside unless they are clearly erroneous and plaintiff-appellant has the burden of showing this. Rule 52 (a), *Federal Rules of Civil Procedure; Grace Bros. v. Commissioner of Internal Revenue,* C.A. 9, 1949, 173 F.2d 170, 174.

Findings of Fact are "clearly erroneous" only when unsupported by substantial evidence, clearly against the weight of the evidence or based on an erroneous view of the law. The Appellate Court in determining whether the Findings are correct looks only to the evidence most favorable to them and to such reasonable inference as will be drawn from such evidence.

2 *Barron and Holtzoff, Federal Practice and Procedure* (1950) 834; *Lewis Mach. Co. v. Aztec Lines,* (C.A. 7, 1949) 172 F.2d 746, 748.

V. APPELLEE'S ARGUMENT

A. OPENING STATEMENT.

A review of the entire record below indicates that from the beginning of the case, plaintiff was attempting to project to the court a relationship between the parties that was not created by the contract in question. At the first trial, plaintiff placed primary reliance upon an opinion of a state trial court in Portland, Oregon, in the case of Coquille Valley Lumber Company v. Bennett, referred to in the record as the "Coquille case". (R. 87.)

There are a number of references in the record to this case and the court's opinion in the Coquille case was included in plaintiff's brief on damages submitted after the first trial.

In closing argument after the first trial, plaintiff referred to the Coquille case as an "identically similar" case in Oregon, and as "an identical case". (1 Tr. 235:1-2, 235:15.)

Defendant obtained and submitted the contract in the Coquille case to the trial court in order to show the great dissimilarity between the "Coquille contract", and the option contract in the instant case. The Coquille contract was one clearly establishing a sales

agency by its very language, terms and provisions. (2 Tr. 683:2-25, 684:1-19.)

The trial court immediately noted the differences in the two contracts, the legal significance thereof (2 Tr. 623:20-25, 667:20-25) and pointed out that the "Oregon court expressly differentiates such a contract from others involving 'sales to a distributor or dealer for resale' ". (R. 87.)

Even plaintiff's counsel admitted that there were two types of contracts in the plywood industry and stated:

> "One is an agency contract and the other a buy-sell . . .
>
> Now, nobody knows why they are different but they are. But the results are the same . . ." (2 Tr. 624:4-5, 7-8.)

Defendant submits that such a view (i.e., that the results are the same) is sophistry and clearly not founded in sound legal analysis.

Plaintiff's protestations that the trial court erred in going beyond the scope of the new trial order are difficult to understand since the court's action in doing so was invited and condoned by the plaintiff.

Plaintiff's counsel contended that the court was in error in its Memorandum of Decision on Motion For New Trial (R. 77) in a letter dated October 13, 1962, addressed to the court just prior to the new trial, as follows:

> "In the court's memorandum of decision on motion for new trial in the next to the last para-

graph on page 5, the court held that the five plant formula was intended by the parties to apply only to 'digger pine' veneer and sheathing as distinguished from 'douglas fir' veneer and plywood.

I believe this conclusion is erroneous and I know it is contrary to the actual intention of the parties and the draftsman of the agreement.

This indicates that two subsidiary issues may well exist under the legal issue (2):

First: The legal issue as to the proper construction of paragraph 3 of the contract;

Second: A factual issue as to the intent of the parties and the draftsman with respect to it". (R. 96A, 96B.)

The foregoing, coupled with plaintiff's counsel's statement at the new trial of his willingness "to start over completely again" (2 Tr. 3-4), joined in by defendant's counsel (2 Tr. 5:11-14), renders specious plaintiff's argument about the trial court exceeding the scope of the new trial, particularly so in view of the fact that plaintiff itself introduced evidence on the parties' intentions in inserting the price formula in the contract. (2 Tr. 30:22-31:1, 38, 83-86, 102:6-10, 103:5-8.)

B. SUMMARY OF ARGUMENT.

Defendant's position, which is fully supported in the record, is:

That under the contract, plaintiff had the "exclusive option to buy" 95% of the plywood produced by defendant in certain stated discounts from a private

"market price" to be determined in accordance with an objective standard embodied in a price formula intentionally inserted in the contract for that purpose;

That without fault of either party the price formula failed and the contract thereby became unenforceable shortly after its execution;

That the contract was not an exclusive sales distributorship agreement;

That the contract was clear and unambiguous in its terms, but the admitted testimony concerning intent was completely compatible with the contract's stated intent and the doctrine of practical construction does not apply;

That during the five year period the parties dealt with each other, neither insisted on performance in accordance with the contract's terms and thereby effectively modified or waived, by their conduct during this period, the requirements of the contract;

That during the five year period the parties were doing business together, the defendant's conduct in selling to others besides plaintiff that portion of the production as to which plaintiff had not exercised its "exclusive option to buy" did not constitute the breach of a contract which was already unenforceable;

That in submitting the matter to litigation, plaintiff waived its right to the arbitration provisions of the contract;

That the pre-trial order effectively placed before the court the question of whether the contract was enforceable;

That plaintiff, by actively and voluntarily retrying the issue of intent as to the price formula in the contract, is now precluded from complaining of the court's reversal of its decision at the first trial;

That the contract is unenforceable, plaintiff has not been damaged and the judgment of the District Court must be affirmed.

C. ARGUMENT.

1. Under the contract plaintiff had the "exclusive option to buy" 95% of the plywood produced by defendant at certain stated discounts from a private "market price" to be determined in accordance with an objective standard embodied in a price formula intentionally inserted in the contract for that purpose.

(a) Law applicable to contract interpretation.

The legal effect and meaning of a contract is ordinarily a question of law and when extrinsic evidence has been received, the legal effect and meaning of whichever version of the facts is adopted by the trial court is a question of law. The outward manifestation or expression of assent is controlling, and what the language of a contract means is a matter of interpretation for the courts; it is not controlled in any sense by what either of the parties intended or thought its meaning to be. *Citizens Utilities Co. v. Wheeler,* 156 C.A. 2d 423, 432; 319 P.2d 763, 769; *Apra v. Aureguy,* 55 C.2d 827, 830; 361 P.2d 897, 899. See also *California Code of Civil Procedure,* Sections 1858 and 1861.

Every word should be accorded its just and proper meaning. *Brickell v. Batchelder,* 62 C. 623 at 631.

"It is a cardinal rule that in the interpretation of a contract every word used therein is to be given its full meaning and effect." *Neale v. Morrow,* 150 C. 414 at 418; 88 P. 815, 817.

The applicable statute is *California Civil Code,* Section 1644, Sense of Words:

"Words to be Understood in Usual Sense.

The words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning; unless used by the parties in a technical sense, or unless a special meaning is given to them by usage, in which case the latter must be followed."

(b) Particular language used by the parties in the agreement and pleadings.

The contract provided that plaintiff should have *"the exclusive option to buy"* from defendant. (Exh. 1, para. I.)

The parties provided by Definition (d) what the "market price" was to mean when those particular words "market price" were found in the contract. There is no doubt as hereinabove set forth that in "Definitions" the example of how the discounts were applied was intended by the parties to work just that way.

The parties further went on and in paragraph 3 clearly expressed their intention as to how the "market price" was to be established.

"The parties agree that the published market price listed to jobbers by the following plants

> shall *be for the purposes of this agreement the 'market price':"*

Further on in the agreement the parties set forth in paragraph 10 that the price of plywood *purchased* by the plaintiff "shall be the 'market price' to jobbers, less 5% and an additional 2% if the invoice is *paid* in accordance with paragraph 4".

Paragraph 4 provided that the plaintiff *"shall make payment"* to the defendant fifteen days after the invoices were mailed.

In paragraph 6 the parties clearly express their intention that when the plaintiff did not exercise its option the defendant would *"then be free to sell that portion of its estimated output on the open market through brokers . . . or through its own sales organization for that month."* (All italics ours.)

Plaintiff's complaint is based on an alleged breach by defendant of an "exclusive option to buy" (R. 9, paras. II, VII and VIII) and not on the alleged breach of any alleged exclusive sales distributorship agreement.

In addition, plaintiff's complaint recognized the fact that plaintiff was to "purchase" from defendant (R. 9, paras. VI and IX.)

The Pre-Trial Order contains references to the fact that the action was for the alleged breach of an "exclusive option to buy" and plaintiff's recognition of the fact it was to purchase from defendant under the option. (R. 28-31.)

It is difficult to see how, if the parties intended that the plaintiff was to receive an "exclusive option to buy" at stated discounts from a "market price" to be determined by a formula, the contract could have been worded any clearer in this regard. Nowhere in the contract is there any reference to the word "distributorship". The contract is also entitled "Sales Agreement".

As stated above, the contract must be interpreted so that every word is accorded its just and proper meaning and so as to effect the intention of the parties as expressed by them.

It is fundamental that an option is a mere right of election acquired under a contract to accept or reject an offer. *Ware v. Quigley,* 176 C. 694, 698; 169 P. 377, 378; *Transamerica Corp. v. Parrington,* 115 C.A.2d 346, 352; 252 P.2d 385, 389.

With the parties having agreed in unequivocal language that the formula would set the "market price" for the purposes of the agreement, and that the plaintiff was to pay the defendant the so determined "market price", less certain stated discounts, it seems almost too clear for argument that once the formula failed there was no way plaintiff could effectively exercise the option since the offer then lacked an essential term—namely, price.

(c) Testimony as to intention.

That the parties intended the five plant formula to apply to all plywood as to which plaintiff had the right to execute its "exclusive option to buy" is un-

controverted. All the witnesses so testified. (Depo. J. 6:20-22; 1 Tr. 34:2-4, 116:5-8; DM-NT 59:8-13; 2 Tr. 4:1-12, 30:22-31:1, 38:16-19, 46:16, 86:13-16, 103:7-8, 169:1-6.)

How can plaintiff refute the trial court's construction of the contract under the record now before the Appellate Court?

It has already been emphasized that the parties clearly expressed their intentions in the written contract, verified that intent in testimony concerning the circumstances surrounding execution of the contract, and defendant has cited applicable law to the effect the parties' intent cannot be varied under the guise of construction.

2. The pricing formula failed and the contract thereby became unenforceable shortly after its execution.

It is also uncontroverted that of the five mills listed in the formula provisions of paragraph 3 of the contract:

(a) United States Plywood Corporation did not publish lists at Anderson, California. (1 Tr. 73:5-12.)

(b) Sonoma Plywood Co., Sonoma, California, moved to Cloverdale, and went out of existence as Sonoma Plywood Co. (1 Depo. St. O. 12:23-25; 1 Tr. 72:17-19, 92:3.)

(c) Tri-State Plywood Co., Santa Clara, California, didn't publish price lists. (1 Tr. 72:20-22; 2 Tr. 63:15-21, 64:19, 69:12-18.)

(d) Industrial Plywood Corporation, Willits, California, went out of business. (1 Depo. St. O. 13:3-4; 1 Tr. 72:23-25.)

(e) Plywood, Inc., Klamath Falls, Oregon, went out of business at about the time the contract was to be effective. (1 Depo. St. O. 13:5-6, 13:12-17; 1 Tr. 73:3-4, 92:14-15.)

Under circumstances such as herein involved, where a formula inserted in a contract as the intended determinant of price fails without fault of either party, the contract insofar as it remains executory, is unenforceable.

Williston, Contracts, Sec. 41, pp. 134-35 (3rd Ed. 1957);

Canadian Nat. Ry. Co. v. George M. Jones Co., 27 F.2d 240, 242 (6th Cir. 1928);

Louisville Soap Co. v. Taylor, 279 F. 470, 479 (6th Cir. 1922);

Turman Oil Co. v. Sapulpa Ref. Co., 254 P. 84, 87 (Okla. 1926);

Shell Pet. Corp. v. Victor Gas Co., 84 F.2d 676, 680 (10th Cir. 1936).

The holding of the court in *Canadian Nat. Ry. Co. v. George M. Jones Co.,* 27 F.2d 240 (6th Cir. 1928), supra, is controlling in the instant case on two points:

(1) The contract here is unenforceable because of indefiniteness as to price.

(2) Even where the parties considered themselves to be bound by an alleged contract, there

may be no binding and enforceable contract in existence between the parties.

In the *Canadian Nat. Ry. Co.* case, the railway company entered into a contract to buy coal from the coal company, deliveries to commence April 1, 1922, and to be continued in installments throughout the then ensuing year. The controversy arose from the price provision in the contract: That the price should be "the same as paid seller by other railroads on contract for mine run coal from the Hocking district at the time this contract becomes effective". On the effective date of the contract, the coal company had no contracts with other railroads.

In view of the failure of the pricing mechanism, the court held, as follows (27 F.2d 240, at 242):

> ". . . the seller having no contracts with other railroads then in effect, the *clearly intended method* and means for fixing price failed, the provision as to price became ineffective and inoperative, and *the contract became unenforceable by reason of the indefiniteness of this controlling element* and the necessity for further agreement thereon. (Citations omitted)." (Emphasis added.)

The court then goes on to say (27 F.2d 240, at 242):

> "In seeking recognition of this uncertainty as to price, an exchange of views upon the subject was proposed by the purchaser immediately upon the possibility of shipment arising. *The fact that both parties considered themselves as bound by the contract of November 25, 1921, at least to the extent of being under obligation to agree upon*

> *price, does not affect the situation, since both likewise recognized the necessity of price determination. There was no binding and enforceable contract then in existence between the parties. They were negotiating to make definite and certain that which then was indefinite. . . .*" (Emphasis added.)

It is true that in the *Canadian Nat. Ry. Co.* case, the parties, recognizing the fact that they had no binding agreement because of the failure of the pricing mechanism, thereafter got together and agreed on a definite price of $3.50 per ton. Shipments were made at that price and paid for by the railway company at that price. The court held, therefore, that since the parties had agreed on a *definite price* and had adhered to that price for some time, the agreed price became operative in a binding contract. However, as the court said at 27 F.2d 242, in commenting on the fact that until they had agreed on a definite price, there was no binding agreement:

> "Even then the suggestions as to price revision by the buyer were offered in the spirit of seeking favor rather than as an assertion of right."

In the *Turman Oil Co.* case, supra, plaintiff and defendant entered into a written contract, for the sale by plaintiff to defendant of all oil produced from certain leases for a period of one year to be paid for at the posted market price on the date the oil was run, paid by the Prairie Oil & Gas Company for "Mid-Continent crude." The latter company, which

for eleven years had been posting a single market price for all "Mid-Continent crude" without regard to gravity of the oil, changed its method of price fixing and graded all "Mid-Continent crude" into seven grades according to gravity, with a separate price for each grade, and ceased posting a single price for all "Mid-Continent crude". The court held as follows (254 P. 84, at 88):

> "We think when the Prairie Oil & Gas Company, the price-fixing agency named in the contract, ceased to post a single market price for Mid-Continent crude, as was its custom when the contract was made and for 11 years prior thereto, the contract ended, for the reason that the price to be paid could not be determined from the contract."

Interestingly enough, the court in the *Turman Oil Co.* case, at page 87, commented as follows:

> ". . . We think the case is somewhat analogous to that of an executory contract for the sale of goods, providing that the price to be paid shall be fixed by valuers appointed by them. In such case it is uniformly held, so far as we know, that, if the persons appointed as valuers fail or refuse to act there is no sale. (Citations)."

Such analogy seems valid as the lower court here pointed out in its memorandum of opinion following the retrial (R. 97):

> "On the contrary, the five mill formula for determination of market price is comparable to (although not identical with) 'sale at a valuation' referred to in Calif. Civil Code Sec. 1730 which

provides in effect that where the third person valuer, without fault of either party, cannot or does not fix the price, the contract is thereby avoided."

"In the pending case the evidence indicates, and the case has been tried by both parties upon the theory that shortly following the execution of the contract several of the five mills listed in the formula were no longer in business, others were not publishing their prices, and a fifth, U. S. Plywood, although publishing prices, was not publishing prices specifically for its mill at Anderson.

Both parties have tried the case upon the theory that it became, therefore, impossible for the parties to ascertain market price according to the formula by averaging the published market prices listed by the five named mills.

Plaintiff has suggested that it can be held as a matter of law that in such event the 'average' of the published prices should be ascertained by averaging the published price of any two or more mills actually publishing. However, even if two mills were publishing, such an interpretation of the formula would be, to say the least, a rewriting of the formula which clearly calls for averaging the published prices of the *five* named mills". (R. 100-101.)

A similar case involving failure of a specific price formula is *Ross Lumber Co. v. Hughes Lumber Co.*, 264 F. 757, 759-760 (5th Cir. 1920):

"The criterion upon which (depended) the price of the commodity to be delivered by the defend-

> ant to the plaintiff, *a necessary term of a binding contract,* thus, without fault of either of the parties, ceased to exist, and either party could refuse to be further bound by the terms. . . ." (Emphasis added.)

The California case of *Jules Levy & Bro. v. A. Mautz & Co.* (1911), 16 C.A. 666, 669, 117 P. 936, 937, is illustrative of the legal principle in point. In that case, involving the breach of a contract by defendant to buy a minimum amount of $4,000 of merchandise from plaintiff each year for five years, for cash or on such terms as might be agreed to from time to time by the parties, the court, in giving judgment for the defendant, held as follows:

> "It is elementary in law that a contract of sale must be certain as to the thing sold and designate the price to be paid for it (Civ. Code, Sec. 1729); and *it is well settled that if an executory contract of sale is uncertain and incapable of being made certain for the thing sold, neither of the parties can be held to its terms nor recover damages for its breach.* (Breckenridge v. Crocker, 78 Cal. 533, (21 Pac. 129); Association v. Phillips, 56 Cal. 539; Talmadge v. Arrowhead, 101 Cal. 367, (35 Pac. 1000); National Bank v. Hall, 101 U. S. 50, (25 L.Ed. 822); Schenectady Stove Co. v. Holbrook, 101 N. Y. 48, (4 N. E. 4); Grafton v. Cummings, 99 U.S. 106, (25 L.Ed. 366).)"

There is no point in plaintiff citing cases such as *California Lettuce Growers v. Union Sugar Co.* (1955), 45 C.2d 474, 289 P.2d 785.

In the present case, plaintiff and defendant selected a definite way of determining price which failed. The *California Lettuce Growers* case concerned a contract which was *silent* as to price, and goods (beets) *which had been delivered,* a totally different situation from ours in these important particulars.

The court in *Jules Levy & Bro. v. A. Mautz & Co.,* 16 C.A. 666, 117 P. 936, 937, furnishes the distinguishing feature in the *California Lettuce Growers* case, at 669, as follows:

> "It is true, generally, *that where no price is fixed* in a contract for the sale of a commodity, the law, *upon a delivery and acceptance of the thing sold, implies an understanding between the parties that a reasonable price is to be paid,* and in such a case the contract will be deemed to be executed. In other words, in the absence of a fixed price, *or an agreement as to the mode of ascertaining the value of the goods sold* and delivered pursuant to the contract of sale, the purchaser will be held liable for the reasonable value of the goods (citations omitted).
>
> *"Where, however, the price of a commodity called for but not delivered is to be subsequently ascertained and fixed by the valuation of others or by the agreement of the parties, the contract of sale is incomplete, and nonenforceable, until the price is so fixed or agreed upon* (citations omitted)." (Emphasis added.)

3. The contract was not an exclusive sales distributorship.

Defendant submits that the characterization by plaintiff of the agreement between the parties as one

constituting an exclusive sales distributorship agreement is not relevant to the issues in this case.

The contract must be tested by its own terms and provisions, and to project desired legal consequences by labeling an agreement by some generalized descriptive term does not change either the legal relationship or the legal effect created by the express words of the contract.

None of the cases cited by plaintiff, from which it endeavors to import a relationship outside the express provisions of the contract, concern issues between parties involving an option to buy, such as the present case. In other words, plaintiff has quoted language from cases where the distributorship relationship was expressly covered in the contract itself and where there is no factual similarity.

For example, *Mantel v. International Plastic Harmonica Corp.* (1947), 141 N.J. Eq. 379, 55 Atl.2d 250 (Appellant's Brief, pp. 51-52) is not applicable to the instant action for the following reasons:

1. The *Mantel* contract was bilateral in nature since it bound the distributor to take all of the harmonicas produced by defendant-manufacturer every month, but not exceeding 30,000 per month. Thus, quantity was certain and the distributor was absolutely bound to take 30,000 harmonicas per month (see 55 A.2d at page 254). In this case, plaintiff was not required to buy any plywood from defendant since its purchases were at its own option.

2. The *Mantel* contract expressly appointed the defendant company as its "general distributor" in a specified territory in New York. (See 55 A.2d at 254.) The instant "sales agreement" contains no language specifically appointing plaintiff a distributor.

3. In the *Mantel* case, there is no option granted the distributor. The latter had to take a specific quantity of harmonicas. Here plaintiff had an "option to buy".

4. The *Mantel* case contract provided as follows:

"And it was provided that the corporation 'shall deliver to the distributor, and the latter shall take, during every month, beginning with July, 1945, all of the harmonicas produced' by it, but not exceeding 30,000 a month, 'at the lowest prices and with the highest discount which it' shall give to any other distributor in the United States of America;"

Thus, the *Mantel* case is inapposite since there was no price formula provided whereby the prices for harmonicas were to be the average of prices of other harmonica manufacturers. Hence there was really no outside standard to establish price in the *Mantel* case unlike the present situation, since in *Mantel* the selection of the price fixing mechanism was entirely dependent upon the act of the defendant-manufacturer in appointing other distributors.

In fact, the court held in the *Mantel* case as follows (55 A.2d 250 at page 254):

> "But the agreement did not fix either the price of the goods or a standard for the admeasurement of the price. Indeed, appellants frankly concede that when the agreement was made, 'it was not practical to fix a free price', since the plastic harmonica 'had not yet been perfected' and the manufacturer's production capacity was all together speculative and unknown".

The court further held (55 A.2d 255):

> "Performance of the mutual obligations undertaken was not to be deferred until another distributor was designated. The very terms of the writing were conclusive of that proposition. *There were preemptory correlative obligations of purchase and sale from the outset.* Defendant was bound to deliver, and complainants obliged to accept the entire production up to the specified maxima, during every month". (Emphasis added.)

As a final distinguishing characteristic the court, in the *Mantel* case held as follows (55 A.2d 250 at 255):

> ". . . because of exigencies of the particular situation, the parties were deliberately silent as to price; and thus they imported into their contract the standard of reasonableness which the law implies in a contract *mute as to price* and providing no mode or standard for the fixation of the price."

Lastly, the *Mantel* case came up from the lower court on an appeal from an adjudication of civil con-

tempt against the defendant-manufacturer and from a decree enjoining the defendant from selling harmonicas to others than plaintiff (complainant) and ordering a referee to ascertain past damages. It is totally different from the factual situation here where the parties had been doing business together for some time, where the contract had provided an objective means of establishing price, and where the testimony of both parties without conflict shows that since there was no legally binding way to determine price, neither party, unless they could agree upon price, regarded itself as legally bound to buy or to sell.

Obviously, each case must turn on its own facts and plaintiff, in citing *J. C. Millett Co. v. Park & Tilford Distillers Corp.* (1959) 123 F.Supp. 484. (Appellant's Brief, p. 53) again refers to a case involving an oral contract of distributorship, conceded to be such by the parties, and where the court was concerned with what constituted a reasonable time for the termination of such contract. In that case, unlike the instant one, the plaintiff had maintained warehouse facilities and purchased and stored inventory. There was no factor in that case involving interpretation of the agreement and there was nothing in the oral contract whereby the distributor was afforded an option.

It is submitted that the plaintiff has cited no case which is in point insofar as the facts of the instant case are concerned and particularly has not cited any case where the word "option" has been interpreted

to give a party a distributorship. In fact, plaintiff has cited no case to show that when parties have agreed that price is to be determined by averaging five published prices that the contract does not fail when it becomes impossible to obtain an average of the five, even though a representation that the law substantiated this position previously was made to the court by plaintiff's counsel. (DM-NT 59:23-60:18.)

It is submitted that plaintiff has no cause to complain about the type of agreement. The evidence shows clearly that it was the plaintiff who suggested the form of the agreement. (2 Tr. 40:14-19.) If plaintiff had desired a different type of contract, it could have suggested a true exclusive sales agency agreement wherein the agent sells at a commission and not this buy-sell type of arrangement, where it reserved to itself the determination of whether or not it would buy from the defendant. Obviously, plaintiff did not wish to assume the obligation to sell for the manufacturer here and the other legal burdens inherent in the principal-agency relationship.

Under the only interpretation possible as to the meaning of the word "option", it is elementary law that an option imposes no obligation (on the optionor) until it is accepted according to its terms, and unless the option is accepted it is, insofar as California law is concerned, of no force for any purpose. *Lawrence Block Co. v. J. E. Palston* (1954), 123 C.A.2d 300, 309; 266 P.2d 856, 862; *R. L. Kahn v. H. Lischner* (1954), 128 C.A.2d 480, 485; 275 P.2d 539, 542; *H. D. Upton v. Travelers Insurance Co.* (1919), 179 C. 727,

729; 178 P. 851, 852; *Transamerica Corp. v. T. M. Parrington* (1953), 115 C.A.2d 346, 352; 252 P.2d 385, 389.

What plaintiff is really trying to do is to twist the words "exclusive option to buy" around in some semantical way until they come out to mean "exclusive sales distributorship". An "exclusive option to buy" is at least inapposite of an exclusive option to sell. The construction for which plaintiff contends ignores the very features of the contract about which plaintiff's own attorney, Garthe E. Brown, testified that they had "considerable discussion". (2 Tr. 30-31.) The contract cannot be reoriented to project legal consequences tailored to suit plaintiff's objectives in the light of any situation that may have occurred after the contract's execution and in the face of the clear intent of the parties as expressed by the contract itself and their own testimony as to the importance of the pricing formula.

4. The doctrine of practical construction does not apply.

It is submitted that the doctrine of practical construction, so heavily relied on by plaintiff, is not applicable to the facts of this case.

The function of contract interpretation is to try to ascertain the true intent of the parties.

In *F. H. Gillespie v. L. D. Ormsby* (1954), 126 C.A. 2d 513 at 522; 272 P.2d 949, 955 the court states the rules governing the inquiry into intent quite clearly.

> "The rules governing our inquiry are well established. 'In construing a contract, the pri-

> mary object is to ascertain and give effect to the intention of the parties. (Citations.) That intention must, in the first instance, be derived from the language of the contract. The words, phrases, and sentences employed are to be construed in the light of the expressed objectives and fundamental purposes of the parties to the agreement. (Citation.)' (Hensler v. City of Los Angeles, 124 Cal. App. 2d 71, 77, 78 (268 P.2d 12).) (2) It is likewise well settled that a written contract is to be construed strictly against its drafter. (Burr v. Sherwin-Williams Co., 42 Cal. 2d 682, 693-694 (268 P.2d 1041); Pacific Lbr Co. v. Industrial Acc. Com., 22 Cal. 2d 410, 422 (139 P.2d 892); E. A. Strout Western Realty v. Gregoire, 101 Cal. App. 2d 512, 517 (225 P.2d 585).) (3) Where necessary to gain the true intent of the parties, a court will consider the circumstances surrounding the execution of the agreement. (Code Civ. Proc., Sec. 1860; Hay v. Allen, 112 Cal. App. 2d 676, 682 (247 P.2d 94).)"

The mutual intention of the parties as it existed at the time of contracting is what the court, through interpretation and construction, is attempting to determine. 12 *Cal. Jur.* 2d, Contracts Section 120, page 328.

> *"The object and meaning of the parties' contract must be determined by their intent at the time of its execution, and it cannot be extended beyond its plain import by circumstances which occurred after its execution, and which were not within their contemplation at the time of execution." Houge v. Ford,* 44 C.2d 706 at 713; 285 P.2d 257, 260. (Emphasis added.)

The applicable statute is found in the California Civil Code:

> "Sec. 1636. Mutual Intention To Be Given Effect Contracts, How Interpreted. A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful."

A contract that is deliberately executed is presumed to express the parties' intentions *(Kayser v. Gorman* (1935), 3 C.2d 478 at 486; 44 P.2d 1041, 1044) and the burden of overcoming this presumption rests on the one who seeks to avoid the contract's plain terms. *Taff v. Atlas Assur. Co.* (1943), 58 C.A.2d 696 at 702; 137 P.2d 483, 487.

The contract states:

> "The parties agree that the published market price listed to jobbers by the following plants shall be for the purposes of this agreement the 'market price':" (Exh. 1, para. 3.)

The testimony is quite clear that the parties intended the five mill formula to determine the contract price for all plywood as to which plaintiff was given an option to buy. (1 Depo. J. 6:20-22; 1 Tr. 34:2-4, 116:5-8; DM-NT 59:8-13; 2 Tr. 4:4-12, 30:22-31:1, 38:16-19, 46:16, 86:13-16, 103:7-8, 169:1-6.)

It seems too clear for argument that since the parties specified their intent in the written words of the contract (Exh. 1, para. 3) and then testified that what they had said in the contract was what they intended, that there is no ambiguity in the contract.

In such circumstances, the California law allows no room for practical construction.

In *Petersen v. Ridenour* (1955), 135 C.A.2d 720 at 725; 287 P.2d 848, 850 the court referred to the doctrine of practical construction as follows:

> "The evidence showed conduct on both sides which would amount to a practical construction of the contract in harmony with defendants' contention were it not for the fact that practical construction has no place in the consideration of an unambiguous agreement. (12 Cal. Jur. 2d Sec. 129, p. 342.)"

Ambiguity signified doubtfulness or uncertainty *Kraner v. Halsey* (1889), 82 Cal. 209 at 212; 22 P. 1137, 1138 and a contract containing ambiguity is to be construed most strongly against the party that prepared it, *Waters v. Waters* (1961), 197 C.A.2d 1 at 5; 17 Cal. Rptr. 95, 97. The applicable statute is found in the California Civil Code:

> "Sec. 1654. Uncertainty, Interpretation Against Party Causing; Presumption Words To Be Taken Most Strongly Against Whom. In cases of uncertainty not removed by the preceding rules, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist. The promisor is presumed to be such party; except in a contract between a public officer or body, as such, and a private party, in which it is presumed that all uncertainty was caused by the private party."

The testimony established without conflict that the contract in dispute was prepared from a model of

another "Sales Agreement" brought to the meeting by F. A. Johnson, president of plaintiff corporation, and that the suggestion of the five plant formula to determine price came from the plaintiff's attorney, Mr. Brown, and F. A. Johnson, plaintiff's president, and was dictated by Mr. Brown (Exh. 29; 2 Tr. 24-31, 40-42, 101.)

Under the circumstances there is no room for the application of the doctrine of practical construction in connection with the contract in issue.

It is basic that it is not the province of the court to rewrite the contract for the parties *Nourse v. Kovacevich* (1941), 42 C.A.2d 769 at 772; 109 P.2d 999, 1001 and cases cited therein. An unenforceable contract cannot be made enforceable by reading into the contract provisions under the so-called doctrine of practical construction that would impugn and contradict the clear intent of the parties.

5. Waiver or modification as between the parties.

As to executed transactions, there can be no question but that the parties by their conduct impliedly waived or modified the contract so as to disregard the five mill formula because they had found the formula unworkable (App. Brief 10:2-5.)

The testimony is clear that the parties either agreed on the price or plaintiff did not exercise its option to buy plywood. In all cases where the parties did agree on price, plaintiff exercised its option and defendant filled the order.

(a) Modification.

The applicable statute is found in the *California Civil Code:*

> "Sec. 1698. Written Contract.
>
> "A contract in writing may be altered by a contract in writing, or by an executed oral agreement, and not otherwise."

The record is conclusive to the effect that the contract in question was not altered by a contract in writing. During the period of time that the parties were doing business together, they entered into certain executed transactions where plaintiff would buy plywood from defendant when they could mutually agree upon price. As to those executed transactions, the record is clear that neither party insisted on the pricing formula contained in the contract but in those instances they were agreeing on the price. Significantly, there were many occasions when the parties could not agree on price and on none of those occasions did plaintiff insist that defendant sell at a specific price, obviously because there was no objective determinant available by virtue of which plaintiff could insist that defendant was bound to sell at an objectively ascertained price.

(b) Waiver.

The intentional relinquishment of a known right with knowledge of the facts is a waiver. *Alden v. Mayfield* (1912), 164 C. 6 at 11; 127 P. 45, 48; 51 Cal. Jur. 2d Waiver Section 2, p. 306.

Waiver of a legal right may be implied as well as express and takes place where one dispenses with the performance of something he has the right to exact. *Jones v. Sunset Oil Co.* (1953), 118 C.A.2d 668, 673; 258 P.2d 510, 514. Waiver may be as effectively accomplished by conduct which naturally and justly leads to the conclusion that the right to performance has been dispensed with. *Bowman v. Santa Clara County* (1957), 153 C.A.2d 707, 713; 315 P.2d 67, 70; 51 Cal. Jur. 2d Waiver Section 4, p. 309.

The testimony shows without question that the parties intended the five mill formula to apply and that they put it in the contract for the purpose of ascertaining the price to be paid by plaintiff.

It is difficult to reach any conclusion other than that the parties waived the application of the formula on all purchases consummated during the five years they dealt together. However, it is also apparent that many purchases during this time were not made by plaintiff since there was a dispute as to price and no means available to resolve that difference.

Since the modification or waiver was not in writing, its effectiveness under the applicable statute would only relate to executed transactions.

6. No breach by outside sales.

Defendant has already covered the failure of the pricing formula and the consequent effect in respect of the uneforceability of the contract.

When the intended objective means of determining price failed, the parties in attempting to negotiate price were faced with a legal and practical deadend. Thereafter, they were operating under an unenforceable agreement and either, if it had wished, could have invoked the legal unenforceability of their relationship. The fact that for a while neither chose to do this did not alter the fact that the perspective of the legal situation was one of unenforceability. Consequently, the hypothesis upon which plaintiff seeks to establish an alleged breach as to so-called "outside sales" during the period the parties were doing business together, is based upon a false major premise, to wit, that the parties were doing business under an enforceable contract. Moreover, additional factors, even for the moment ignoring the effect of the price formula failure, militate against the validity of plaintiff's position.

Plaintiff has persistently ignored the legal effect of the "option to buy" provision of the contract. An option is a mere right of election acquired under a contract to accept or reject an offer; it imposes no obligation (on the optionor) until it is accepted according to its terms, and unless accepted it is of no force for any purpose. See *Ware v. Quigley,* 176 C. 694, 698; 169 P. 377, 378; *Transamerica Corp. v. Parrington,* 115 C.A.2d 346, 352; 252 P.2d 385, 389; *Lawrence Block Co. v. Palston,* 123 C.A.2d 300, 308; 266 P.2d 856, 861; *Kahn v. Lischner,* 128 C.A.2d 480, 485; 275 P.2d 539, 542; *Upton v. Travelers Insurance,* 179 C. 727, 729; 178 P. 851, 852.

The evidence is uncontradicted that every time the parties agreed on price and the plaintiff exercised its "exclusive option to buy" defendant sold plaintiff the plywood. (1 Tr. 48, 55, 142; 2 Tr. 158, 323, 425; 1 Depo. St. O. 15-16.)

The contract itself contemplated that defendant would have the right to sell its production to others when plaintiff did not exercise its "exclusive option to buy". (Exh. 1, para. 6, p. 3.) The lower court held, and the evidence clearly shows, that the parties waived the notice provisions of paragraph 6. (R. 118; 1 Tr. 44:10-17, 144:14-17; 2 Tr. 432:3-433:6.)

Furthermore, the contract imposed no limitation on defendant's right to sell its production to any purchaser it chose at any price it saw fit in the event plaintiff did not exercise its "option to buy".

The cited testimony establishes that plaintiff's president, F. A. Johnson, knew that the defendant had to go out on the market and sell its plywood in order to stay in business (2 Tr. 141:1-5); that plaintiff's sales manager, St. Onge, knew defendant's production, was constantly aware what was being manufactured, and received specific answers to questions directed to Keith Smith, defendant's sales manager, about what defendant's production was going to be. (1 Tr. 74:9-17; 2 Tr. 324:7-18, 431:17-433:6.)

The law in California is that no implied condition can be inserted in conflict with the express terms of a contract or to supply a covenant upon which the contract is silent. *Foley v. Euless,* 214 C. 506 at 511;

6 P.2d 956, 958. There is no authority, and plaintiff has cited none, to the effect that there is an implied obligation not to do something specifically authorized by the contract itself.

7. Arbitration provision of the contract was waived.

The arbitration provision of the contract states that:

> "Arbitration hereunder shall be governed by the laws of the State of California relating to arbitration". (Exh. 1, para. 18, p. 8.)

The California law was clearly stated by the court in *Local 569, I.A.T.S.E. v. Color Corp. of America,* 47 C.2d 189 at 194; 302 P.2d 294, 297:

> "In harmony with the arbitration statute, supra, it has been held that the arbitration provision of a contract may be waived by either or both of the parties by litigating the dispute which would be arbitrable under the provision and not raising the question of the arbitration provision (numerous citations to cases omitted), and that a failure by a party to proceed to arbitrate in the manner and at the time provided in the arbitration provision is a waiver of the right to insist on arbitration as a defense to an action on the contract."

Plaintiff obviously waived any rights it had under the arbitration provisions of the contract by litigating the issue in the District Court. Neither the Complaint nor the Pre-Trial Order make reference to arbitration. (R. 9, 28.)

VI. REPLY TO SUBSIDIARY ISSUES RAISED BY APPELLANT

A. THE PRE-TRIAL ORDER EMBRACED THE ISSUE OF THE ENFORCEABILITY OF THE CONTRACT.

The Pre-Trial Order contains the following in connection with the issue of the enforceability of the contract:

"Agreed Facts"

II

". . . if it was valid and enforceable . . ."

IV

". . . if it was valid and enforceable . . ."

VI

"In connection with said release by plaintiff (and if said written agreement was valid and enforceable) . . ."

(three references to validity and enforceability of the contract similar to the above quotation are found in said paragraph)

VII

". . . (if said written agreement was valid and enforceable) . . ."

VIII

". . . (if said written agreement was valid and enforceable) . . ."

"Plaintiff's Contentions"

I

". . . that said contract was at all times valid and enforceable prior to defendant's breach . . ."

"Issues"

I

"Was the contract involved valid and enforceable by plaintiff, and if so did defendant breach or repudiate it?"

B. THE COURT PROPERLY EXERCISED ITS AUTHORITY IN EXPANDING THE SCOPE OF THE NEW TRIAL.

1. **Plaintiff itself reopened the issue of contract interpretation.**

At the hearing on Defendant's Motion for New Trial, plaintiff actually contended that the formula in the contract was to fix market price for the parties. (DM-NT 56:9-60:15.) Plaintiff is also on record to this effect in its counsel's letter of October 13, 1962, addressed to the trial judge. (R. 96 A-B.) This position was reiterated in the opening address to the court on the retrial. (2 Tr. 4:1-12.)

During the course of the retrial, plaintiff introduced testimony relative to the parties' intention in inserting the five mill formula in the contract. (2 Tr. 30:22-31:1, 85:4-86:6, 102:6-10, 103:5-8.) The testimony of plaintiff's own witnesses at the second trial confirmed the contract's clear language to the effect the five mill formula was to be the binding objective standard for fixing price.

The law is clear that in such circumstances plaintiff cannot complain about the court's expanding the scope of the new trial.

4 *Cal. Jur.* 2d, Appeal and Error, Section 556, pages 420-421, contains the following statement:

> "Parties must abide by the consequences of their own acts, and cannot seek a reversal for errors which they committed or invited . . . and an appellant who has treated a question as an issue in a case will not on appeal be heard to say that instructions or findings thereon are erroneous as outside the issues."

The California Supreme Court in *Cross v. Bouck,* 175 C. 253 at 257; 165 P. 702, 703, makes the following comment:

> "The appellants having treated this question as an issue in the case, they will not, on appeal, be heard to say that the finding must be disregarded as outside of the pleadings."

2. The court has inherent power to reverse itself when convinced it is wrong.

In the trial court's Memorandum of Decision on Motion for New Trial (R. 77) the court concluded that the five plant formula was intended to apply only to "digger pine" plywood and not to other types of plywood. (R. 82.) The court believed that the absence of evidence to support damage under California Civil Code Section 1787 (3) was ground for a new trial upon the issue of damages. (R. 88.)

Thereafter, at the hearing on Defendant's Motion for New Trial, as well as in his letter of October 13, 1962, and in his opening statement on the retrial, plaintiff's counsel insisted that the court was wrong in concluding that the five plant formula was to apply

only to digger pine. The evidence introduced at the second trial by plaintiff, as well as that introduced by defendant, obviously convinced the trial judge that his first conclusion on the applicability of the five plant formula had been erroneous. In the court's Memorandum of Opinion following the retrial the trial judge concluded, *in accordance with the evidence introduced by plaintiff* that the five mill formula was intended to apply to all plywood. (R. 98.) Defendant submits that this reversal of opinion by the trial court was not only proper but clearly necessary to prevent a miscarriage of justice.

The *Federal Rules of Civil Procedure* provide as follows:

> "Rule 16.
>
> Pre-Trial Procedure; Formulating Issues
>
> ". . . and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice."

> "Rule 15.
>
> Amended and Supplemental Pleadings
>
> "(b) Amendments to Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues."

Rule 16 has to be read in the light of Rule 15(b). *Bucky v. Sebo* (1953), 208 F. 2d 304, 305.

Where counsel raise other issues at the trial, such issues will be disposed of through the trial even if they are not in the pre-trial order. *Firemans Ins. Co. of Newark N. J. v. Show,* 110 F. Supp. 523, 530. See also *Kline v. S. M. Flickinger Co.* (1963), 314 F.2d 464, 467.

The pleadings will be deemed amended to conform to the issues actually tried below, even though the appellate level has already been reached. *Purofied Down Prod. Corp. v. Travelers Fire Ins. Co.* (1960), 278 F.2d 439, 444.

The comment made by the court in *Continental Casualty Co. v. American Fidelity and Cas. Co.* (1959), 186 F. Supp. 173 at 179, while arising from somewhat different circumstances gets to the substance of the reason for the above rules:

> "Such a result would create an absurdity. It would compel a court under certain circumstances, faced with the conclusion that its prior decision was erroneous, to compound the error by abiding by that prior decision merely because the error pervading the judgment is not among those which are raised by a motion to amend."

C. APPELLANT'S SPECIFICATIONS OF ERROR ARE BASED ON ERRONEOUS PREMISES CLEARLY UNSUPPORTED BY EVIDENCE.

Defendant submits that its statement of the case and the foregoing points and authorities, together

with record references to the evidence relied upon in support thereof, sufficiently support the material findings challenged by plaintiff in its Specifications of Error.

In compliance with Rule 18 (3), defendant cites the following references to the record relied upon as supporting the findings challenged by plaintiff in its Specifications of Error:

Plaintiff's Specification Number	Record References Relied Upon by Defendant to Support the Challenged Finding
1	Exh. 1, para. 1, p. 2; Complaint, p. 1, para II (R. 9) (the legal theory of the entire complaint concerned a buy-sell contract only); Pre-Trial Order, p. 2, para. III; 2 Tr. 623:12-19.
2	R. 96 A-B; 2 Tr. 4:1-12; Exh. 1, Definitions (d), para. 3, para. 4, para. 10; 1 Depo. J. 6:20-22; 1 Tr. 34:2-4, 116:5-8; 2 Tr. 30:22-31:1, 38:16-19, 169:2-6; DMNT 59:8-13.
3	See *Turman Oil Co. v. Sapulpa Ref. Co.,* 254 P. 84 at 87.
4	Testimony of St. Onge, Plaintiff's Sales Mgr., 1 Tr. 64:21-23; 2 Tr. 333:13-16, 334:13-19. In the latter reference, he admitted it was "extremely difficult" to determine general market price.
5	2 Tr. 30:22-31:1 where plaintiff's witness testified that "considerable discussions" were had as to a formula to fix price "if the parties couldn't agree" at the time of the execution of the contract.

Plaintiff's Specification Number	Record References Relied Upon by Defendant to Support the Challenged Finding
6	Exh. 1, para. 3; R. 96 A-B; 2 Tr. 4:1-12; 1 Depo. J. 6:20-22; 1 Tr. 34:2-4, 116:5-8; 2 Tr. 30:22-31:1, 38:16-19, 169:2-6; DM-NT 59:8-13; 2 Tr. 333:15-22; 334:13-19, 355:6-15, 357:12-16, 359:2-360:25.
7	1 Tr. 68:5-69:18; 2 Tr. 325:10-13, 334:20-335:1.
8	Exh. 1, para. 3 and 10; 1 Depo. J. 6:20-22; 1 Tr. 34:2-4, 116:5-8, 2 Tr. 30:22-31:1, 38:16-19, 169:2-6; DM-NT 59:8-13.
9	See record references for Specification of Error 7, supra, showing that the parties, as to executed transactions, waived the five mill formula; the contract (Exh. 1 para., 3) sets forth their intent that the five mill formula fix the "market price"; the testimony (see record references for Specification of Error 2) conclusively showed they intended the formula to apply as the objective, binding means to fix price and, therefore, there is no ambiguity in the contract. "Practical construction has no place in the construction of an unambiguous agreement". *Petersen v. Ridenour,* 135 Cal.App.2d 720 at 725, 287 P.2d 848 at 850.
10	This statement is completely at variance with the evidence concerning the intent of the parties at the time of the execution of the contract (see record reference for Specification 9 and case citation).

Plaintiff's Specification Number	Record References Relied Upon by Defendant to Support the Challenged Finding
11	See record references for Specification 9.
12	See record references for Specification 4. Further, the parties' intent is to be determined at the time of the execution of the contract and at that time they intended the five plant formula to be the binding objective standard for fixing price (See record references for Specification 2 and *Houge v. Ford,* 44 C.2d 706 at 713, 285 P.2d 257 at 260). The plaintiff waived the arbitration provision of the contract by litigating the issues herein involved and never resorting to arbitration. (*Local 569 v. Color Corporation,* 47 C.2d 189 at 194, 302 P.2d 294 at 297.) As to "implied consent" by waiver, see record references to Specification 7.
13	See Exh. 5; Pre-Trial Order "Issues", para. I, R. 32, 1 Depo. Schwab 26:18-27:9. Plaintiff has persistently ignored the basic fact in the entire record that the parties had an unworkable, unenforceable agreement because of the failure of an essential part of the contract, the five plant pricing formula.
14	This is a distortion of the trial court's language in 2 Op., R. 117. The court was merely stating, in effect, that plain-

Plaintiff's Specification Number	Record References Relied Upon by Defendant to Support the Challenged Finding
	tiff had the burden of proving that there was an enforceable contract in order to recover. (See 2 Op., R. 116.) Plaintiff uses the words "impossibility or frustration" out of context. The defense of unenforceability was available to defendant under the issues of the Pre-Trial Order (Pre-Trial Order "Issues", para. I, R. 32).
15	Plaintiff itself reopened the issue of contract interpretation and itself broadened the issues at the retrial. R. 96 A-B, 2 Tr. 4:1-12, 30:22-31:1, 85:4-86:6, 102:6-10, 103:5-8. See *Cross v. Bouck,* 175 Cal. 253 at 257, 165 P. 702 at 703; *Fed. Rules of Civil Procedure* 15 (b).
16	See 2 Tr. 707:22-25 where the court said, ". . . I think we have given everybody a chance to put on all the evidence that he thought should be in". Plaintiff did not dispute this at the close of the trial nor offer additional evidence.
17	See Pre-Trial Order, R. 28-33, "Agreed Facts", paras. II, IV, VI, VII and VIII; plaintiff's contentions I and "Issues", para. I.
18	See 1 Tr. 74:9-17, 149:23-150:3; 2 Tr. 324:7-18 (Plaintiff's sales mgr., in fact, testified that he never felt defendant was "withholding information"— 2 Tr. 324:13-18).

Plaintiff's Specification Number	Record References Relied Upon by Defendant to Support the Challenged Finding
	See also 2 Tr. 430:3-9 and 2 Tr. 638:3-7 where plaintiff's counsel agreed that "both parties knew what the production was". Plaintiff did not buy more from defendant because it thought defendant's prices were too high. 2 Tr. 640: 5-11. Plaintiff's president admitted it was necessary for defendant "to go out on the market and sell their plywood in order to stay in business". 2 Tr. 141:1-5.
19	Exh. 1, para. 6, Notice requirement of this paragraph was waived. 1 Tr. 44, 144; 2 Tr. 432-433; 1 Depo. Schwab 27. Also, the mills in general sold to the same customers. 2 Tr. 594:12-17. Defendant had the right to sell on the "open market" by para. 6 of Exh. 1.
20	See Exh. 1. This was not one of the terms of the contract. Plaintiff had only an option to buy. Para. 6, Exh. 1, expressly granted defendant the right to sell on the "open market" if plaintiff did not exercise its option. See also record references for Specification 19. Also, plaintiff's personnel, including its Sales Mgr., were engaged in buying from competing plywood companies. 1 Tr. 51:17-18, 53:18-20; 2 Tr. 314; 1 Depo. St. Onge 11:15-12:5.
21	The record is clear that general market price was extremely difficult to ascertain and the inference is clear that this

Plaintiff's Specification Number	Record References Relied Upon by Defendant to Support the Challenged Finding
	was a primary reason for the inclusion of the five mill formula in the contract. The essential vice in the parties' relationship, after the failure of the formula, was the absence of any objective standard by which a binding price could be enforced between the parties. See record references for specifications 4 and 7.
22	See record references for Specifications 19 and 20. As a practical matter, defendant, in view of the serious involvement by plaintiff's personnel in competing plywood operations (particularly the organization of Veneer Products, a competing plywood mill) had reasonable cause for concern that plaintiff would not place defendant's interests first. The contract did not prohibit plaintiff from placing an order elsewhere and since St. Onge was acting for others, besides buying from defendant, the inference is strong that orders were placed by him with other mills during the course of the parties' dealings.
23	See Exh. 3 and Keith Smith's account of this transaction in 2 Tr. 380:4-381:12.
24	No implied obligation can be inserted in a contract in conflict with the express terms of a contract or to supply a covenant upon which the contract is silent. *Foley v. Euless,* 214 Cal. 506 at 511; 6 P.2d 956 at 958.

Plaintiff's Specification Number	Record References Relied Upon by Defendant to Support the Challenged Finding
25	See record references for Specifications 2, 6, 7 and 8.
26	See record references for Specifications 1, 2, 5, 6, 9, 12; and Exh. 1, Definitions (d) and paras. 1, 3 and 10.
27	See record references referred to for Specification 26. The record is clear that plaintiff did not buy and defendant did not sell unless they could "agree" on price, that plaintiff never insisted that defendant sell to it at a price plaintiff considered a binding price, and that there was no objective standard, following the failure of the pricing formula, which would bind plaintiff to buy or defendant to sell if they could not agree.
28	Defendant submits that it can only be concluded, from a review of the evidence, that price was determined by a subjective evaluation of the two sales managers. See record references for Specification 4.
29	The record is clear that there was no purchase by plaintiff if the parties could not agree as to price, and the absence of an objective standard of price determination left both parties without recourse in the event of disagreement. See record references for Specifications 4, 5, 6 and 8.
30	See Exh. 1, para. 3; 1 Depo. J. 6:20-22; 1 Tr. 34:2-4, 116:5-8; 2 Tr. 4:1-12, 30:22-31:1, 38:16-19, 46:16, 86:13-16, 103:7-8, 169:1-6.

Plaintiff's Specification Number	Record References Relied Upon by Defendant to Support the Challenged Finding
31	2 Tr. 359:2-360:25, 381:14-382:18; 1 Tr. 68:5-69:18; 2 Tr. 325:10-13.
32	2 Tr. 141:1-5; 1 Tr. 75:4-9; 2 Tr. 324:7-18; 1 Tr. 74:9-17; 1 Tr. 143:12-21; 2 Tr. 422:3-13; 2 Tr. 140:18-25, 158:23-159:2.
33	See record references for Specifications 31 and 32.
34	See record references for Specifications 6, 13, 25, 27, 30, 31.
35	See record references for Specification 34.
36	See record references for Specification 7.
37	See record references for Specification 14.
38	The inconsistency between the court's opinion after the first trial and its opinion after the second trial was because of a misapprehension of the court at the first trial as to the products covered by the pricing formula. This was clarified for the court when the plaintiff introduced evidence at the second trial showing that the pricing formula applied to all products. The effect of such evidence, however, was to render untenable the premise upon which the court had based its decision at the first trial.
39	Under the evidence at the second trial, it is submitted that the court had no alternative except to find in defendant's favor.

VII. CONCLUSION

Defendant submits that the evidence introduced at the retrial, particularly the testimony of plaintiff's own witnesses in connection with the intended binding effect of the pricing formula, completely destroyed the foundation of the court's decision in plaintiff's favor at the first trial.

It is apparent that the failure of the objective means of determining price undermined the certainty and definiteness of the contract as a whole. This is demonstrated in the parties' dealings which amounted in effect to an agreement to agree because there was no outside standard or index by which the parties could be bound in fixing a price on the purchases to be made by plaintiff.

Plaintiff's position is based on the completely unwarranted assumption that plaintiff, if the relationship between the parties had continued, would have exercised its option to buy 95% of the defendant's production. Plaintiff thereby assumes that the parties, if they had continued their buy-sell negotiations in the future, would not have been confronted with the same dead-end of price disagreements that characterized their operations in the past. Obviously, without an operative binding determinant as to price beyond the control of either party, disagreements as to price would have continued and there would have been no legally efficacious means of resolving them.

Plaintiff's case must fall, therefore, by reason of the uncertainty of the contract in respect of its pricing

feature and the unenforceability of the contract as a result thereof.

While defendant has shown that the plaintiff's attempt to read into the relationship certain "implied obligations" in conflict with certain express provisions in the contract is without merit, defendant submits that, under any view of the relationship, plaintiff is hardly in a position to stress equities when its own position in this perspective is to be seriously questioned. The activities of plaintiff's executives in promoting the interests of competing plywood mills hardly justifies the pre-emption by plaintiff of an attitude of innocent behavior.

In any event, the contract cannot be rewritten for the parties in order to achieve the objectives sought by plaintiff. As the record of the second trial so conclusively shows, plaintiff itself chose the form of the agreement, proposed the "option to buy" and five mill pricing formula provisions and brought to the meeting at which the contract was executed a "model" agreement from which the essential features of the agreement in question were taken. Assuredly under such circumstances, it would be unseemly to indict defendant for the failure of the contract under actual operating conditions and to impose upon defendant legal consequences completely out of context with contractual intent.

The judgment of the lower court was rendered after a thorough analysis of the legal and factual considerations embodied in the case and the decision is the only possible one under the circumstances of this case.

It is submitted that the judgment of the lower court should be affirmed.

Dated, San Francisco, California,
December 11, 1963.

Respectfully submitted,
O'Gara & McGuire,
James O'Gara, Jr.,
E. James McGuire,
Walter R. Wright,
Attorneys for Appellee.

Certificate of Counsel

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

E. James McGuire,
Attorney for Appellee.